Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ELIZABETH REGALBUTO; LYNNE OLIVERI, INDIVIDUALLY AND IN HER OWN RIGHT, AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO

Petitioners

vs.

CITY OF PHILADELPHIA; PHILADELPHIA POLICE DEPARTMENT; PHILADELPHIA FIRE DEPARTMENT; JOHN DOE NUMBER ONE; JOHN DOE NUMBER TWO

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Joseph M. Marrone Jr., Esq.
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Counsel for Petitioners

53 pp

QUESTION PRESENTED

WHETHER THE ACTIONS OF POLICYMAKERS AND OFFICIALS OF THE CITY OF PHILADELPHIA'S 911 EMERGENCY RESPONSE SYSTEM IN FAILING TO GUARD AGAINST UNTIMELY RESPONSES TO 911 CALLS AND FAILURE TO TIMELY RESPOND TO AN EMERGENCY MEDICAL CALL SUPPORT A SUBSTANTIVE CAUSE OF ACTION FOR VIOLATIONS OF 42 U.S.C. §1983 AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMMENDMENT ?

LIST OF PARTIES

(X) All parties appear in the caption of the case on the cover page.

( ) All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this petition is as follows:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at Appendix A to the petition and

( ) is reported at ; or,
( ) has been designated for publication but is not yet reported; or,
(X) is unpublished.

The opinion of the United States District Court for the Eastern District of Pennsylvania appears at Appendix B to the petition and

( ) is reported at ; or,
( ) has been designated for publication but is not yet reported; or,
(X) is unpublished.

JURISDICTION

The United States Court of Appeals for the Third Circuit decided this case on June 17, 1996.

No petition for rehearing was timely filed in this case and therefore the jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of

Columbia.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and

Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or give aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove

such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or nay claim for the loss or emancipation of any slave; but all such debts obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Pursuant to Supreme Court Rule 14 (1)(f) and 14 (1)(i), the verbatim text of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution also appears at Appendix C and Appendix D respectively.

STATEMENT OF THE CASE

At all relevant times, decedent, Samuel R. Regalbuto, was domiciled in Philadelphia County and resided at 1636 S. Orkney Street Philadelphia, Pennsylvania 19148. As a resident of Philadelphia County, the decedent was charged and paid a fee for the availability of the "911" service.

In the evening of February 18, 1995 the decedent was attending a gathering at 2638 Elbridge St. NE Philadelphia, Pa. 19149. At approximately 8:40, decedent was having difficulty breathing and collapsed to the ground, several individuals stated that they would call "911" to request medical assistance. John Ciccatta then called "911," explained to the "911" dispatcher that the decedent was unable to breathe, and asked the dispatcher to send an ambulance immediately to the address where the decedent was located. The "911" dispatcher assured Mr. Ciccatta that an ambulance would be immediately sent to the address of where the decedent was located.

Approximately five minutes after Mr. Ciccatta's call to "911," Maria Ciccatta called "911" and was told by the "911" dispatcher that an ambulance would arrive shortly. A short while after Maria Ciccatta called "911" and no rescue vehicles arrived, Mary Jane, Sandy Haslett, and John Martucci called "911" and were assured by the dispatcher that a rescue vehicle was in route. During the interim, Trudi Ciccatta, who is a registered nurse, and Anthony Ciccatta were performing CPR, cardiopulmonary resuscitation, on the decedent, who was still having trouble breathing and had become unconscious.

Approximately twenty minutes after the initial call to "911," a fire engine and police car arrived at the decedents location. However, the rescue personnel did not immediately enter the premise of where the decedent was located despite the fact that a number of people at the location were instructing them that the victim (decedent), was inside the house. After waiting several minutes, rescue personnel finally entered the

premise to perform their lifesaving duties. The rescue personnel administered life saving techniques to the decedent and used a defibulator. However, after several attempts, the defibulator machine did not function properly and in effect lost its charge and "ran out of juice."

Approximately five minutes after the arrival of the fire engine and police officer, an ambulance arrived on the scene. The decedent was found in full cardiac and respiratory arrest by the paramedics. He was administered emergency medical aid and transported to Nazareth Hospital, where he was pronounced dead at 9:31 p.m..

A civil action was initiated by the Petitioners by filing a Complaint in the United States District Court for the Eastern District of Pennsylvania on September 5, 1995 alleging violations of 42 U.S.C. §1983 and the Fourteenth Amendment to the United States Constitution. Subject matter jurisdiction in the United States District Court for the Eastern District of

Pennsylvania was conferred under 42 U.S.C. §1983, 28 U.S.C. §1331 and 28 U.S.C. §1343. The court also maintained pendent jurisdiction over Petitioners' state law claims and Venue was vested in the court by virtue of 28 U.S.C §1391.. The Complaint alleged that the Respondents violated the decedents and Petitioners guaranteed Civil Right pursuant to 42 U.S.C. §1983 and by violating the parties Substantive Due Process rights as guaranteed by the Fourteenth Amendment of the United States Constitution. Respondents thereafter filed a Motion for Judgement on the Pleadings, reciting that Petitioners failed to state a claim on which relief can be granted. Petitioners, filed a Response to the Motion to Dismiss and requested that the motion be denied.

On November 9, 1995, oral argument was heard on the motion and the court requested that supplemental briefs be filed incorporating the case; *Fagan v. The City of Vineland*, 22 F.3d 1296 (1994), and the "Shock the Conscience" standard.

Petitioners requested that the motion be denied because they effectively stated a valid claim and the actions of the respondents did effectively "shock the conscience." On December 13, 1995, the District Court granted the respondents motion and dismissed the Complaint.

On January 5, 1996, petitioners filed a Notice of Appeal with the United States Court of Appeals for the Third Circuit. Subject matter jurisdiction in the Court of Appeals was conferred pursuant to 28 U.S.C. §1291. On June 17, 1996, the Court of Appeals denied the appeal and affirmed the District Court's opinion. It is at this time that the Petitioners respectfully petition this Honorable Court for a Writ of Certiorari pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

The Fourteenth Amendment to the Constitution of the United States does not provide protection to individuals unless the violation alleged is one that infringes upon a fundamentally

protected Constitutional right. Similarly, 42 U.S.C. §1983 does not provide protection unless the governmental entity, who qualifies as a policy maker, has executed a policy, practice or custom that has directly and indiscriminately injured an individual. However, the City of Philadelphia is liable for violations of 42 U.S.C. §1983 and the Constitution in this case because the execution of a policy, practice or custom by the City of Philadelphia increased the response time to "911" rescue and deprived the decedent of his right to life, thereby contributing to the decedents demise.

Generally, the City of Philadelphia does not have an affirmative duty to protect or provide for police, fire or rescue personnel and services. However, when services are provided, they must not be administered negligently. In kind, where there exists certain "special relationships", the State has an affirmative duty to protect and care for private individuals. *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 289

(1989). A failure to provide such care will implicate constitutionally protected rights. *Id.* The City of Philadelphia having acknowledged that assistance was on the way and having undertaken the duty to send and render emergency medical care to the decedent, created a "special relationship". The City of Philadelphia thereby acquired an "affirmative duty," enforceable through the Due Process Clause, to do so in a reasonably competent fashion. Its failure to discharge that duty, by either stating that no rescue was available or for the callers to take the decedent to a hospital because there was no ambulance nearby, was an abuse of governmental power that so "shocks the conscience" as to constitute a violation of Substantive Due Process.

A substantive component of the Due Process Clause can only be violated when conduct amounts to an abuse of official power that "shocks the conscience." However, the Third Circuit has noted that there are some inconsistency within the circuit

regarding the standard governing the underlying constitutional violation in policy, custom or practice cases. The Court of Appeals proceeded to distinguish the *Fagan* (in banc) decision with the *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) (panel opinion).

In accord with the *Fagan* panel opinion, a constitutional violation occurs simply by demonstrating that the policy makers, acted with deliberate indifference and enacted an inadequate policy that caused injury. The key is that the court in *Fagan* has never been overruled, and the appropriate standard to analyze the present case appears to be "shock the conscience." However, no matter if this Court applies the "shock the conscience" standard or the "deliberate indifference" standard, there is a no question that the City of Philadelphia, in this case has violated the Fourteenth Amendment Due Process Clause regarding the decedent and the Appellants.

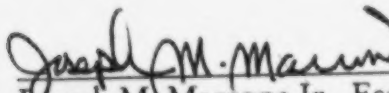
Therefore, the United States Court of Appeals has

decided a question of federal law, to wit whether the actions of officials of the City of Philadelphia in failing to guard against untimely responses to 911 calls and failure to timely respond to the call in the instant case constitutes a violation of 42 U.S.C. §1983 and the Due Process Clause of the Fourteenth Amendment, which has not been, but should be, settled by this Honorable Court.

CONCLUSION

It is now for the above stated reasons that the petition for a writ of certiorari should be granted.

Respectfully submitted,



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ELIZABETH REGALBUTO; LYNNE OLIVERI, INDIVIDUALLY AND IN HER OWN RIGHT, AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO

Petitioners

vs.

CITY OF PHILADELPHIA; PHILADELPHIA POLICE DEPARTMENT; PHILADELPHIA FIRE DEPARTMENT; JOHN DOE NUMBER ONE; JOHN DOE NUMBER TWO

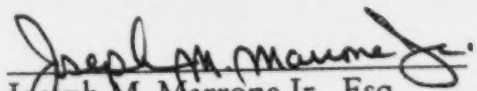
Respondents

PROOF OF SERVICE

I, Joseph M. Marrone Jr., Esquire, do swear or declare that on this August 23, 1996, as required by Supreme Court Rule 29, I have served the enclosed PETITION FOR WRIT OF CERTIORARI on every person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid. The names and addresses of those served are as follows:

Marie C. Lasota
Assistant City Solicitor
City of Philadelphia Law Department
1600 Arch Street , 8th Floor
Philadelphia, Pa. 19103

I declare under penalty of perjury that the foregoing is true and correct and this document was Executed on August 23, 1996



Joseph M. Marrone Jr., Esq.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ELIZABETH REGALBUTO; LYNNE OLIVERI, INDIVIDUALLY AND IN HER OWN RIGHT, AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-2094

ELIZABETH REGALBUTO; LYNNE OLIVERI, INDIVIDUALLY AND IN HER OWN RIGHT, AND AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO,

Appellants,

vs.

CITY OF PHILADELPHIA; PHILADELPHIA POLICE DEPARTMENT; PHILADELPHIA FIRE DEPARTMENT; JOHN DOE NUMBER ONE; JOHN DOE NUMBER TWO

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 95-05629)
District Judge: Honorable John R. Padova

Submitted under Third Circuit Lar 34.1(a)
June 5, 1996

BEFORE: COWEN, NYGAARD and LEWIS, Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered on December 13, 1995, be and is hereby AFFIRMED, essentially for the reasons set forth in the district court's opinion.

Costs taxed against the appellants.

BY THE COURT:

/S/
Circuit Judge

Attest:

/S/
Clerk
Date: Jun 17, 1996

Costs Taxed in Favor of Appellees as follows:

Total for Brief. . . .$75.40
Total. . . .$75.40

Certified as a true copy and issued in
lieu of a formal mandate on July 9, 1996

Teste:

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTER DISTRICT OF PENNSYLVANIA

ELIZABETH REGALBUTO and LYNNE OLIVERI, INDIVIDUALLY IN HER OWN RIGHT and AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA; PHILADELPHIA POLICE DEPARTMENT; PHILADELPHIA FIRE DEPARTMENT; JOHN DOE NUMBER ONE, DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY, PHILADELPHIA COUNTY; JOHN DOE NUMBER TWO, DIRECTOR OF COMMUNICATIONS, DIVISION OF EMERGENCY DISPATCH, DEPARTMENT OF PUBLIC SAFETY, PHILADELPHIA COUNTY	:	NO. 95-5629

MEMORANDUM

I. INTRODUCTION

This civil rights suit alleges that the City of Philadelphia's "911" service inadequately responded to calls for

emergency aid made on behalf of decedent, Samuel Regalbuto (hereinafter "Decedent"). Plaintiffs, Decedent's wife and daughter, allege causes of action under 42 U.S.C.A. § 1983 (West 1994), the Pennsylvania Constitution, and state common law against: (1) the City of Philadelphia (hereinafter "the City"); (2) the Philadelphia Police and Fire Departments, which, Plaintiffs allege, implement and execute the 911 service; (3) "John Doe Number One," Director of the Department of Public Safety, Philadelphia County; and (4) "John Doe Number Two," Director of Communications in the Division of Emergency Dispatch services for the Department of Public Safety, Philadelphia County.

Currently before the Court is Defendants' Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c), asserting that Plaintiffs have failed to state a claim upon which relief can be granted. Defendants also move separately for the dismissal of the Philadelphia Police and Fire Departments. For the reasons discussed below, I will grant Defendants' motions.

I. FACTUAL ALLEGATIONS AND COMPLAINT

Plaintiffs set forth the following factual allegations in their Complaint. On February 18, 1995 at about 8:40 P.M., Decedent, who was attending a gathering at a Philadelphia residence, began having difficulty breathing and collapsed to the ground. An individual at the gathering promptly called "911" to request an ambulance. The 911 dispatcher told him that an ambulance would be sent immediately. In the twenty minutes that elapsed between this first call and the arrival of a fire engine and police car, two more calls were made to check on the ambulance's status; each time, the dispatcher assured the callers that an ambulance was en route.

When the fire engine and police care arrived on the scene, these personnel did not enter the house until several minutes later, despite being informed that Decedent was inside and in need of assistance. Upon entering the house, these personnel administered an I.V. and used a defibrillator. However, the defibrillator did not function properly. Approximately five minutes after the arrival of the fire engine

and police car, an ambulance arrived and the ambulance personnel entered the residence to assist Decedent. At that point, Decedent was in full cardiac and respiratory arrest. The ambulance personnel administered emergency aid and transported Decedent to Nazareth Hospital, where he was pronounced dead at 9:35 PM.

Plaintiffs advance two theories of liability under 42 U.S.C.A. § 1983. First, Plaintiffs allege that Defendants maintained certain policies, practices and/or customs in reckless disregard or with deliberate indifference to Decedent's Fourteenth Amendment right to life, property, and due process. Specifically, Defendants did not implement adequate systems and databases, procedures, and supervision to ensure that personnel quickly and adequately responded to emergency calls. Plaintiffs further allege that although Defendant knew of the 911 system's numerous deficiencies, they continued to misrepresent the service's efficiency, causing Philadelphia County residents to call 911 and rely on its services instead of seeking alternative emergency aid that was available to them.

Second, Plaintiffs allege that Defendants breached their duty of care to Decedent and deprived him of his rights to substantive due process in violation of 42 U.S.C. § 1983. Defendants knew that Decedent and those acting on his behalf would rely on Defendants' representations about 911 services, including the dispatcher's assurances that an ambulance would arrive soon, and this reliance would preclude Decedent from contacting other sources of emergency aid. By their actions and misrepresentations, Defendants created a "special relationship" with Decedent, depriving him of his ability to obtain alternative emergency aid and placing him in danger. This special relationship imposed an affirmative duty on Defendants to provide Decedent with prompt and effective medical assistance.

Plaintiffs allege that these actions and misrepresentations also violated Decedent's right to life, property, and due process under the Pennsylvania Constitution. They seek compensatory damages, for medical, funeral, and estate expenses, lost earnings and benefits, and pain and suffering, damages for loss of companionship, punitive damages, and attorneys' fees.

II. STANDARD OF REVIEW

A motion for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) is assessed under the same standard as a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Nelson v. ARA Food Service, No. Civ. A. 94-4542, 1995 WL 303990, at *6 n. 13 (E.D. Pa. May 18, 1995) (citing Constitution Bank v. DiMarco, 815 F. Supp. 154, 157 (E.D. Pa. 1993)). Therefore, in deciding a Rule 12(c) motion, a district court must view the facts and inferences to be drawn from the pleadings in the light most favorable to the non-moving party. Janney Montgomery Scott, Inc. v. Shepard Niles, Inc., 11 F. 3d 399, 406 (3d Cir. 1993) (citation omitted). Under Rule 12(c), judgment will only be granted if it is clearly established that no material issue of fact remains to be resolved and that the movant is entitled to judgment as a matter of law. Institute for Scientific Information, Inc. v. Gordon and Breach, Science Publishers, Inc., 931 F. 2d 1002, 1005 (3d Cir.) (citing Jablonski v. Pan American World Airways, 863 F. 2d 289, 290-91 (3d Cir. 1988)), cert. denied, 502 U.S. 909, 112 S. Ct. 302

(1991); see also Travelers Indemnity Co. v. Stedman, 895 F. Supp. 742, 745-46 (E.D. Pa. 1995) (noting that a court may not grant judgment on the pleadings unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief) (citation omitted).

III. DISCUSSION

A. Claims Against the Philadelphia Police and Fire Departments

Defendants correctly argue that as a matter of law, the suit must be dismissed against the Philadelphia Police and fire Departments because they are not separate legal entities that can be sued. See 53 Purdon's Pa. Stat. Ann. § 16257 (West 1957)[1]; Baldi v. Philadelphia, 609 F. Supp. 162, 168 (E.D. Pa.

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[1]. The statute states in relevant part:

> [N]o such department shall be taken to have. . . a separate corporate existence, and hereafter all suits growing out of their transactions. . .shall be in the name of the City of Philadelphia.

53 Purdon's Pa. Stat. Ann. § 16257 (West 1957)

1985) (holding that police department did not have separate corporate existence from city so as to permit it to be sued for civil rights violations); Philadelphia v. Glim, 613 A.2d 613, 616 (Pa. Commw. Ct. 1992) (holding that fire department may not be sued as if it were legal entity separate from city; all suits against any city department must be brought against the city itself, because departments do not have independent legal existence). Therefore, I dismiss the police and fire departments from the suit.

B. 42 U.S.C.A. § 1983 Claim

Section § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory, or the District of Columbia, subjects, or cause to be subjected, any citizen of the Untied States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for

redress.

42 U.S.C.A. § 1983 (West 1994). Section 1983 does not create substantive rights, but instead provided remedies for rights established elsewhere. City of Oklahoma v. Tuttle, 471 U.S. 808, 816, 105 S. Ct. 2427, 2432 (1985) (plurality opinion) (citation omitted). Therefore, to establish their § 1983 claim, Plaintiffs must allege that Defendants, acting under color of state law, deprived Decedent of a right secured by the Constitution. See Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.) (citing Moore v. Tartler, 986 F.2d 682, 685 (3d Cir. 1993)), cert. denied, 116 S. Ct. 165 (1995).

In the instant case, Plaintiffs claim that Defendants deprived Decedent of his substantive due process rights, arguing two distinct theories of liability under § 1983. Defendants contend that under either theory, Plaintiffs' factual pleadings, which the Court must consider as true for purposes of this Rule 12(c) motion, do not establish a § 1983 cause of action. I consider each basis for liability in turn.

1. Municipal Policies, Practices, and Customs

A municipality can be sued directly under § 1983 where an action or conduct taken pursuant to municipal policy or custom causes a constitutional injury. Monell v. Dep't of Social Serv. of the City of New York, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 2037-38 (1978); City of Canton, Ohio v. Harris, 489 U.S. 378, 388, 109 S. Ct. 1197, 1204 (1989). To maintain a § 1983 action a municipality, a plaintiff must allege that municipal policymakers, acting with deliberate or reckless indifference, established and maintained a practice, policy or custom which deprived plaintiff of a constitutional right. See Fagan v. City of Vineland, 22 F.3d 1283, 1292, reh'q, 22 F. 3d 1296 (en banc) (3d Cir. 1994) (holding that city may be liable under § 1983 for deprivation of substantive due process rights for failing to train police officers in high-speed pursuit, when plaintiffs were injured in collision with car attempting to evade police); Stoneking v. Bradford Area School Dist., 882 F.2d 720, 724-25 (3d Cir. 1989) (holding that plaintiff, who was sexually assaulted by teacher, stated a claim under § 1983 against school

district and its officials for violation of her substantive due process rights, by following a practice of not taking action upon allegations of sexual misconduct by teachers), cert. denied, 493 U.S. 1044, 110 S. Ct. 840 (1990).

In Collins v. City of Harker Heights, Tex., 503 U.S. 115, 120, 112 S. Ct. 1061, 1066 (1992), the Supreme Court made clear that "proper analysis requires [the court] to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." (citation omitted). The Court emphasized the separate character of these two inquires, noting that not all municipal policies that cause harm are unconstitutional or actionable under § 1983. Id. at 122-23, 112 S. Ct. at 1067.

In this case, Defendants argue that Plaintiffs' pleadings do not meet the first prong of Collins because they fail to allege a specific constitutional right that Defendants violated through

their actions or omissions.[2] I agree. In Mark v. Borough of Hatboro, 51 F.3d 1137, 1149-50 (3d. Cir. 1995), the Third Circuit Court of Appeals reiterated the Collins standard that

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[2]In their moving papers, Defendants also argued that the City must be dismissed from this suit because Plaintiffs did not allege that any individual city employee caused constitutional injury to Decedent. Defendants asserted that the City could not be held liable in the absence of individual liability. (The Complaint did not name as defendants either the 911 dispatcher who handled the calls made on decedent's behalf, or the individual emergency personnel who arrived t the scene. Defendants also noted that the John Doe defendants have not been named or served with the Complaint.)

In Fagan, 22 F.3d at 1291-92, the United Sates Court of Appeals for the Third Circuit specifically addressed the question of whether municipal liability for deprivation of substantive due process rights is possible under § 1983 if no individual municipal employee violates the Constitution. Fagan held that even if no individual employee committed a constitutional tort, a city can still be liable of its policy makers, acting with deliberate indifference, implemented and maintained a policy that caused the individual employee to deprive plaintiff of life or liberty. Id. at 1292.

At oral argument held on Defendants' motion on November 9, 1995, this Court asked the parties to submit supplemental briefs on Fagan's applicability to the instant case. Defendants' acknowledged Fagan's holding in their supplemental brief, but argued that Plaintiffs still could not maintain a § 1983 action against the city because they did not allege a constitutional injury.

unless plaintiff first establishes that he or she has suffered a constitutional injury, it is irrelevant for purposes of § 1983 liability whether the city's policies, enacted with deliberate indifference, caused an injury. For example, in Stoneking, 882 F.2d at 725-27, in holding that the plaintiff could maintain her § 1983 action against a school district for its harm-causing policies, the court found that the plaintiff had a constitutional right to be free form sexual abuse by her teacher. The court reasoned that the right to be free from sexual molestation by a teacher was "closely analogous" to a student's right under the Due Process Clause to be fee from corporal punishment; the Supreme Court recognized the right in Ingraham v. Wright, 430 U.S. 651, 673 & n. 41, 97 S. Ct. 1401, 1413 & n. 41 (1977). Id. at 726-27.

In the instant case, Plaintiffs acknowledge in their responsive papers that the Due Process Clause does not impose an affirmative obligation on the state to provide the public with

adequate emergency rescue services.[3] Plaintiffs instead argue that the City's practice of inadequately training and supervising emergency personnel, which caused delays in response times, was "conscience-shocking" in a constitutional sense, given that Defendant had notice of the deficiencies in the 911 service. The plaintiff in Collins, 503 U.S. 117-18, 128, 112 S. Ct. at 1064, 1070, the widow of a city sanitation department employee who died of asphyxia after entering a manhole, similarly argued that a city's alleged failure to train or warn its employees about the dangers of such work, given notice of the risks, was so arbitrary as to be unconstitutional. The Supreme Court rejected this argument, id. at 128, 112 S. Ct. at 1070, and I find the Collins analysis directly applicable to the instant case. As in Collins, Plaintiffs' claim "is analogous to a fairly typical state law tort claim." Id. However, the Due Process Clause neither

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[3]Although courts in this circuit have not directly addressed the issue, at least one other circuit has found that the Constitution does not require a state to provide effective emergency rescue services. See Archie v. City of Racine, 847 F.2d 1211, 1220-21 (7th Cir. 1988), cert. denied, 489 U.S. 1065, 109 S. Ct. 1338 (1989).

"impose[s] federal duties that are analogous to those traditionally imposed by state tort law," nor does it overturn "the presumption that the administration of Government programs is based on a rational decision making process that takes account of competing social, political, and economic forces." Id. (citations omitted). See also Searles v. Southeastern Pa. Trans. Auth., 990 F.2d 7899, 792-93 (ed Cir. 1993) (applying Collins to hold that transit agency's allegedly negligent inspection and repair programs were not conscience-shocking in the constitutional sense).

The Court has cautioned against expanding the concept of substantive due process and advises judges to exercise "judicial self-restraint" when asked to "break new ground" in this field. Id. at 125, 112 s. Ct. at 1068 (citation omitted). Because Plaintiffs have not sufficiently demonstrated that the City's policies, practices, and customs caused a constitutional tort, I find that Plaintiffs have not pled a § 1983 cause of action under this theory of liability.

2. "Special Relationship"

Plaintiffs present an alternative theory of liability under § 1983. Specifically, they argue that when the 911 dispatcher assured the callers that help was on the way, Defendants created a "special relationship" with Decedent such that Defendants had an affirmative duty to provide Decedent with prompt and adequate emergency care. See DeShaney v. Winnebago County Dep't of Social Serv., 489 U.S. 189, 197, 109 S. Ct. 998, 1004 (1989).

The Due Process Clause is "'a limitation on the State's power to act, not. . .a guarantee of certain minimal levels of safety and security.'" Collins, 503 U.S. at 126, 112 S. Ct. at 1069 (citing DeShaney, 489 U.S. at 195, 109 S. Ct. at 1003). The Clause was designed to prevent government oppression and does not impose an affirmative duty on the state to protect its citizens. Id. (citing DeShaney, 489 U.S. at 196, 109 S. Ct. at 1003). However, the Supreme Court has recognized that when the state takes individuals into custody, the state must affirmatively act to protect those individuals because they are no

longer in a position to fend for themselves. Id. Thus, for example, the state has a duty to ensure the safety of involuntarily-committed mental patients. Youngberg v. Romeo, 457 U.S. 307, 314-25, 102 S. Ct. 2452, 2457-63 (1982). Similarly, the state must provide adequate medical care to inmates because their incarceration prevents them from seeking care on their own. Estelle v. Gamble, 429 U.S. 97, 103-04, 97 S. Ct. 285, 290-91 (1976).

Plaintiffs claim that the instant case falls within the "special relationship" exception, arguing that Decedent was deprived of his ability to seek alternative sources of aid because the dispatcher repeatedly assured the callers that help was on the way. This argument is untenable. The cases in which the Supreme Court has found a "special relationship" make clear that in order for this exception to supply, the state must affirmatively act to curtail the individual's freedom such that he or she can no longer care for him or herself. See Youngberg,457 U.S. at 315-16, 102 S. Ct. at 2457-58; Estelle, 429 U.S. at 103-04, 97 S. Ct. at 290-01. Plaintiffs have not

alleged facts demonstrating that the state exercised sufficient restraint over Decedent to deprive him of his ability to act on his own behalf, thereby assuming an affirmative duty to provide Decedent with adequate emergency services. See also Jackson v. Byrne, 738 F. 2d 1443, 1447 (7th Cir. 1984) (holding that city did not create special, custodial relationship when it established itself as provider of fire protection, and therefore the city did ont have an affirmative duty to act).

Because I find that Plaintiffs' pleadings have failed to state a § 1983 cause of action under either theory of liability, I grant Defendants' Motion for Judgment on the Pleadings with respect to the § 1983 claim.

C. State Law Claims

Defendants' moving papers do not address Plaintiffs' claims under the Pennsylvania Constitution and state common law. Plaintiffs in this case may very well have meritorious state law claims. However, because I have dismissed Plaintiffs' § 1983 claim, and consequently, decline to exercise supplemental

jurisdiction over the state law claims 28 U.S.C.A. 1367(c)(3)[4] (West 1993), I do not reach the merits of those claims. See also United Mine Workers of America v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 1139 (1966) ("[I]f the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.").

IV. CONCLUSION

For the above-mentioned reasons, Defendants' motions to dismiss the Philadelphia Police and Fire Departments and for Judgment on the Pleadings with respect to the § 1983 claim are granted, and Plaintiffs' state law claims are dismissed.

An appropriate order follows.

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[4]The statute provides in pertinent part:

> (c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
> (3) The district court has dismissed all claims over which it has original jurisdiction. . . .

28 U.S.C.A. § 1367(c)(3) (West 1993).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTER DISTRICT OF PENNSYLVANIA

ELIZABETH REGALBUTO and LYNNE OLIVERI, INDIVIDUALLY IN HER OWN RIGHT and AS ADMINISTRATRIX OF THE ESTATE OF SAMUEL R. REGALBUTO	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA; PHILADELPHIA POLICE DEPARTMENT; PHILADELPHIA FIRE DEPARTMENT; JOHN DOE NUMBER ONE, DIRECTOR OF DEPARTMENT OF PUBLIC SAFETY, PHILADELPHIA COUNTY; JOHN DOE NUMBER TWO, DIRECTOR OF COMMUNICATIONS, DIVISION OF EMERGENCY DISPATCH, DEPARTMENT OF PUBLIC SAFETY, PHILADELPHIA COUNTY	:	NO. 95-5629

ORDER

AND NOW, this 11th day of December, 1995, upon consideration of Defendants' Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c) (documents no. 6),

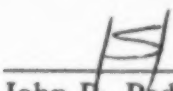
Plaintiffs' response thereto (document no. 7), and the parties' supplemental briefs (document nos. 10 and 11), and after oral argument held before this Court on November 9, 1995, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion is GRANTED;

2. Plaintiffs' state law claims are DISMISSED; and

3. The Clerk of the Court shall mark this case CLOSED.

BY THE COURT:



John R. Padova, J.

APPENDIX C

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX D

FOURTEENTH AMMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or give aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or nay claim for the loss or emancipation of any slave; but all such debts obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.